Ng Boon Leh v Malaysian-American Commission On Educational Exchange (MACEE) & Anor and another application

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS WA-25–145–05 OF 2020 AND WA-25–3–01 OF 2021
NOORIN BADARUDDIN J
30 JUNE 2022

Civil Procedure — Judicial review — Application for — Applicants applied for judicial review challenging awards handed down by second respondent — Second respondent ruled it had no jurisdiction to hear and determine matter — Whether Industrial Court could disregard decision made by Minister of Human Resources to refer matters to it — Industrial Relations Act 1967 s 52(1)

The first respondent ('MACEE') was a binational commission established by way of an agreement between the governments of Malaysia and the United States of America. MACEE was overseen by a board of directors ('the board'). Ng Boon Lee ('the first applicant') was employed by MACEE as an accounts technician while Suseela a/p KS Malakolunthu ('the second applicant') was employed by MACEE as an executive director. Both applicants reported to the Finance Director and Executive Director of MACEE, both of whom are employees of MACEE. By a letter, MACEE notified the first applicant that her employment was terminated with immediate effect. Owing to some allegations made against the second applicant, she was asked to resign from her position by the chairman of the board. Both the applicants claimed unlawful dismissal by MACEE and the Minister of Human Resources Malaysia ('the Minister') referred the matters to the second respondent ('the Industrial Court') for determination. At the outset of the hearing, MACEE raised the issue on jurisdiction of the Industrial Court and the two learned Industrial Courts' Chairlady in both awards ruled that the Industrial Court had no jurisdiction to hear and determine the matters pursuant to the express provision of s 52(1) of the Industrial Relations Act 1967 ('the IRA'). Hence, these applications by the applicants for judicial review challenging the awards.

Held, granting order in terms of the applications:

(1) When there was no issue of the claim being made outside time-limit in the present matter, and where MACEE itself did not seek to quash the Minister's referral by way of a certiorari to the High Court, it was clear that there was no preliminary issue to be determined by the Industrial Court. The preliminary point raised by MACEE in the Industrial Court must be taken substantively as part of the entire hearing of the applicants'

claims where MACEE bore the burden of proving the applicability of s 52(1) of the IRA. The Industrial Court could not abdicate its statutory duty to hear the entire reference on its merits, and in the course thereof make its findings on the entire dispute (see paras 24 & 29).

(2) The mere fact that MACEE was established by the two governments, could not render MACEE as a government entity. It had not been shown under which statute or administrative rules the applicants were subjected to in the course of their employment other than the employment of contract. The applicants were not government servant or under any of the government service in law. No evidence was adduced to show the proximity between the applicants and the Federal Government of Malaysia and the degree of control if any over the applicants by the Federal Government. The applicants had been appointed by the commission vide the board. The applicants as the employee of MACEE could not be gainsaid to be workman employed by the Government of Malaysia as their service with MACEE was not a service under the Government of Malaysia. In addition, the appointment and dismissal of the applicants were done by the commission of MACEE and not the Government of Malaysia. The employment of the applicants by MACEE was inconsistent with the applicants being in government employment as envisaged by s 52(1) of the IRA. There was insufficient evidence or proof to show that the applicants came within the exception to the Industrial Court's jurisdiction under Part VI of the IRA which was a burden to be discharged by MACEE. The Industrial Court's jurisdiction over the representation could not be barred under s 52(1) of the IRA. The present matter must be heard in full and where all evidence had been led by the parties (see paras 31–32, 35–37 & 39).

[Bahasa Malaysia summary

Responden pertama ('MACEE') ialah suruhanjaya binational yang ditubuhkan melalui perjanjian antara kerajaan Malaysia dan Amerika Syarikat. MACEE diawasi oleh sebuah lembaga pengarah ('lembaga'). Ng Boon Lee ('pemohon pertama') telah diambil bekerja oleh MACEE sebagai juruteknik akaun manakala Suseela a/p KS Malakolunthu ('pemohon kedua') telah diambil bekerja oleh MACEE sebagai pengarah eksekutif. Kedua-dua pemohon melaporkan kepada Pengarah Kewangan dan Pengarah Eksekutif MACEE, yang kedua-duanya adalah pekerja MACEE. Melalui satu surat, MACEE memberitahu pemohon pertama bahawa pekerjaannya telah ditamatkan berkuat kuasa serta-merta. Disebabkan beberapa dakwaan yang dibuat terhadap pemohon kedua, dia telah diminta untuk meletakkan jawatannya oleh pengerusi lembaga. Kedua-dua pemohon mendakwa dipecat secara tidak sah oleh MACEE dan Menteri Sumber Manusia Malaysia ('Menteri') merujuk perkara itu kepada responden kedua ('Mahkamah Perusahaan') untuk penentuan. Pada awal perbicaraan, MACEE

membangkitkan isu mengenai bidang kuasa Mahkamah Perusahaan dan kedua-dua Pengerusi Mahkamah Perusahaan yang bijaksana dalam kedua-dua award itu memutuskan bahawa Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mendengar dan menentukan perkara itu menurut peruntukan nyata s 52(1) Akta Perhubungan Perusahaan 1967 ('APP'). Oleh itu, permohonan oleh pemohon untuk semakan kehakiman ini mencabar award.

Diputuskan, membenarkan perintah seperti dipohon dalam permohonan:

(1) Apabila tiada isu tuntutan dibuat di luar had masa dalam perkara ini, dan di mana MACEE sendiri tidak berusaha untuk membatalkan rujukan Menteri melalui certiorari kepada Mahkamah Tinggi, adalah jelas bahawa tiada isu awal untuk ditentukan oleh Mahkamah Perusahaan. Perkara awal yang dibangkitkan oleh MACEE di Mahkamah Perusahaan mesti diambil secara substantif sebagai sebahagian daripada keseluruhan pendengaran tuntutan pemohon di mana MACEE memikul beban membuktikan kebolehgunaan s 52(1) APP. Mahkamah Perusahaan tidak boleh melepaskan kewajipan statutorinya untuk mendengar keseluruhan rujukan atas meritnya, dan semasa membuat penemuannya mengenai keseluruhan pertikaian (lihat perenggan 24 & 29).

(2) Hakikat bahawa MACEE ditubuhkan oleh kedua-dua kerajaan, tidak boleh menjadikan MACEE sebagai entiti kerajaan. Ia tidak ditunjukkan di bawah undang-undang atau peraturan pentadbiran yang mana pemohon tertakluk kepada semasa pekerjaan mereka selain daripada penggajian kontrak. Pemohon bukan kakitangan kerajaan atau di bawah mana-mana perkhidmatan kerajaan dalam undang-undang. Tiada bukti dikemukakan untuk menunjukkan kedekatan antara pemohon dengan Kerajaan Persekutuan Malaysia dan tahap kawalan jika ada ke atas pemohon oleh Kerajaan Persekutuan. Pemohon telah dilantik oleh suruhanjaya melalui lembaga pengarah. Pemohon sebagai pekerja MACEE tidak boleh dinafikan sebagai orang kerja yang diambil bekerja oleh Kerajaan Malaysia kerana perkhidmatan mereka dengan MACEE bukanlah perkhidmatan di bawah Kerajaan Malaysia. Selain itu, pelantikan dan pemecatan pemohon dilakukan oleh suruhanjaya MACEE dan bukannya Kerajaan Malaysia. Penggajian pemohon oleh MACEE adalah tidak konsisten dengan pemohon berada dalam pekerjaan kerajaan seperti yang dibayangkan oleh s 52(1) APP. Tiada keterangan atau bukti yang mencukupi untuk menunjukkan bahawa pemohon termasuk dalam pengecualian bidang kuasa Mahkamah Perusahaan di bawah Bahagian VI APP yang merupakan beban yang perlu dibuktikan oleh MACEE. Bidang kuasa Mahkamah Perusahaan ke atas representasi tidak boleh dihalang di bawah s 52(1) APP. Perkara ini mesti didengar sepenuhnya dan di mana semua keterangan telah dibawa oleh pihak-pihak (lihat perenggan 31–32, 35–37 & 39).]

Cases referred to

Assunta Hospital v Dr A Dutt [1980] 1 MLJ 96 (refd)
Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238, FC (folld)
Government of Malaysia v Rosalind Oh Lee Pek Inn [1973] 1 MLJ 222 (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685; [1997] 3 CLJ 777, SC (folld)
Maulana Abdul Shakur v Rikhab Chand and another 1958 AIR 52, SC (refd)
Roshan Lal Tandon v Union of India 1967 AIR 1889, SC (refd)
State of Rajasthan and Ors v Harish Chandra Sharma and Ors RLW 2006 (4) Raj 3028, HC (refd)
Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 612, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 2, 20(1A), (3), 29, 30, 52, 52(1), Part VI
Petroleum Development Act 1974 s 3(1), (2)

Eshwinder Kaur Gill (Sothi & Ang) for the applicants.
N Sivabalah (with Wong Kian Jun) (Shearn Delamore & Co) for the first respondent.

Noorin Badaruddin J:

[1] The applicants in both applications filed for judicial review challenging the awards handed down by the second respondent in Award No 284 of 2020 dated 29 January 2020 and Award No 1453 of 2020 dated 2 October 2020 accordingly ('the awards').

SALIENT FACTS

[2] The first respondent ('MACEE') is a Binational Commission established by way of an agreement between the governments of Malaysia and the United States of America. Both governments provide funding for the work and projects undertaken by MACEE and private entities also provide cash donations. The main functions of MACEE are to administer the Fulbright grant programmes in Malaysia and to advance binational and cultural exchange on behalf of the two governments.

[3] MACEE is overseen by a Board of Directors ('the Board') which consists of ten regular members with five from each country and two Honorary

Co-Chairman being the United States' Ambassador to Malaysia and the Minister of Higher Education for Malaysia. A

[4] The applicant Ng Boon Lee ('the first applicant'), was employed by MACEE from 1 July 1995 vide a letter dated 28 April 1995 as an accounts clerk on the terms and conditions contained therein. B

[5] The first applicant was promoted many times over the years and given salary increments and her last position held was that of accounts technician (grade 9/11). Her last drawn gross salary was RM7,853.58 per month and MACEE also contributed a sum equivalent to 15% thereof to the Employees Provident Fund and paid her a fixed contractual annual bonus equivalent to two months' salary. C

[6] The first applicant, at all material times reported to the finance director and executive director ('ED') of MACEE, both of whom are employees of MACEE. D

[7] By a letter dated 14 January 2019 MACEE notified the first applicant that her employment was terminated with immediate effect. E

[8] The applicant Suseela a/p KS Malakolunthu ('the second applicant') was employed by MACEE from 1 July 1995 vide a letter dated 2 August 2018 as an interim executive director on the terms and conditions as contained therein for a period of four months. Her employment is governed by the terms and conditions of the letter of employment contract for executive director dated 9 November 2020. F

[9] Thereafter, before the expiry of the four months, based on the second applicant's performance and merit, she was appointed as an executive director for a period of two years from 13 December 2018 until 31 December 2020 vide a contract dated 9 November 2020. Her last drawn gross salary was RM7,500 per month and MACEE also contributed a sum equivalent to 15% thereof to the Employees Provident Fund and paid her annual bonus of US$10,000 upon completion of one year of service. G H

[10] The second applicant, at all material times reported to the finance director and executive director (ED) of MACEE, both of whom are employees of MACEE. I

[11] The ED is stated to be responsible for the day to day management of MACEE.

[12] On 20 December 2018, owing to some allegations made against the second applicant, she was asked to resign from her position by the Chairman of the Board, Bradley Hurst ('COW-1').

[13] Both the applicants claimed unlawful dismissal by MACEE and the Minister of Human Resources Malaysia referred the matters to the Industrial Court for determination.

[14] At the outset of the hearing, MACEE raised the issue on jurisdiction of the Industrial Court and having heard testimony of the witnesses and submissions by both parties on the issue of jurisdiction, the two learned Industrial Courts' chairlady in both awards ruled that the Industrial Court had no jurisdiction to hear and determine the matters pursuant to the express provision of s 52(1) of the Industrial Relations Act 1967 ('the IRA').

THE APPLICANTS' CONTENTIONS

[15] Summarily, it is the applicants' contention that the Industrial Court's determination on jurisdiction as a preliminary issue is unreasonable and illegal. It is the applicants' position that the Industrial Court cannot abdicate its statutory duty to hear the entire reference on its merits and in the course thereof make its findings on the entire dispute.

[16] It is the applicants' position further that they are not government servants in law or under the government service as envisaged by s 52(1) of the IRA and as such the applicants' reinstatement claim does not fall within the intent and purport of s 52(1) of the IRA.

MACEE'S CONTENTIONS

[17] It is MACEE's contention that the Industrial Court had rightly held that the issue concerning its jurisdiction should be determined at the outset without the need to go into the merits of the matter consistent with its power under ss 29 and 30 of the IRA. The Industrial Court is further submitted to have rightly held that s 52(1) of the IRA expressly provides that the provisions of the IRA does not apply to MACEE and that MACEE is a government entity.

FINDINGS

[18] The statutory duty of the Industrial Court is clear. As a court of equity, it has the duty to act fairly, reasonably and to apply the rules of natural justice in hearing the claims and grievances of the applicants on its merits and must come to a reasonable decision. The ambit and meaning of 'unreasonableness' was summarised by the court in *Harpers Trading (M) Sdn Bhd v National Union*

of Commercial Workers [1991] 1 MLJ 417, inter alia, as follows:

> *But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice.* It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.
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> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. *He must call his own attention to the matters which he is bound to consider.* He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. (Emphasis added.)

[19] It must be borne in mind that the applicants' claims were referred to the Industrial Court by way of reference under s 20(3) of the IRA. Therefore, the first question arises herein is whether the Industrial Court can disregard the decision made by the Minister to refer the matters to it or to put in another way, whether the Industrial Court's jurisdiction can be challenged without having attacked the Minister's act of referring the dispute to it (the Industrial Court)? This was the question addressed by the Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 3 CLJ 777. In that case, before the Industrial Court, the respondent took a preliminary objection, complaining in essence that the Industrial Court had no jurisdiction to hear and determine the dispute relating to the appellant who was a foreigner working in Singapore. The objection was overruled, whereupon the respondent applied to the High Court for an order of prohibition to prevent the Industrial Court from adjudicating upon the dispute. The learned judge ruled that the appellant as a foreigner working in Singapore at the time of dismissal and that being so, it was not open to the Industrial Court, having as it were no extraterritorial jurisdiction, to entertain and adjudicate the dispute. An order of prohibition, hence, was issued by the court.

Two questions of law arose for consideration by the Supreme Court namely:

(a) whether having regard to the facts, the Industrial Court had jurisdiction to adjudicate upon the dispute referred to it by the Minister; and

A (b) whether it was open to the respondent to challenge the jurisdiction of the Industrial Court without having attacked the Minister's act of referring the dispute to that court.

B **[20]** In concluding that the learned High Court judge was wrong in holding that the Industrial Court lacked jurisdiction to hear and decide upon the dispute properly referred to it by the Minister, Gopal Sri Ram JCA (as he then was) sitting in the Supreme Court held as follows:

C [4a] *The threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference.* It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, eg because the dispute is extraterritorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of prohibition against that court. *The threshold jurisdiction of the Industrial Court*

D *cannot be challenged without joining the Minister and seeking relief against him.*

[4b] *Having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection.* The legislature's paramount concern in passing the Act is to ensure speedy disposal of industrial disputes, and permitting preliminary objections to the

E threshold jurisdiction being taken will only delay industrial adjudication.

[5] The Federal Court decision in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* should not be taken as going against the proposition in *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96; [1979] 1 LNS 6 that the threshold jurisdiction of the Industrial Court may only be questioned by challenging the

F Minister's reference. Rather, the case of *Fung Keong* should be taken as establishing a very limited exception to the proposition, ie only in cases where the representations under s 20(1) of the Act are made beyond the time prescribed by that section. The decision in *Fung Keong* may be justified upon the narrow ground that the Minister had acted in violation of the provisions of s 20(1) by referring to

G the Industrial Court when the representations were made to the Director General beyond the statutory time limit. In those circumstances the Minister obviously had no power to confer threshold jurisdiction upon the industrial court.

[5a] *It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do*

H *so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order for prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication.*

[5b] *Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion, and in the process deal with the jurisdictional question*

I *eg whether the claimant is a workman or not or whether the matter involves the exercise of extra-territorial jurisdiction.* On no account ought such matters to be dealt with as preliminary objections. (Emphasis added.)

[21] In *Kathiravelu* the Supreme Court had referred to and applied the

judgment in *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 where Mohamed Azmi J (as he then was) in dismissing the applicant's application to prohibit the Industrial Court from hearing the case on its merits had stated:

> My first observation is that the Minister of Labour is not a party in this case; nor is there any relief sought against his decision. On the face of the notice of motion, it must, therefore, be assumed that the exercise of the Minister's power under s 20(3) in referring Dr Dutt's representation to the Industrial Court is not challenged. In the present application for prohibitory order, the question, therefore, arises whether the Industrial Court (in the instant case, the Chairman of the Court) can refuse to make an award in respect of a representation referred to it by the Minister for Labour. *In my judgment, there is no provision in the Industrial Relations Act where the Industrial Court can disregard a decision made by the Minister under s 20(3) of the Act. That section gives unfettered discretion to the Minister; and the exercise of that discretion has not been specifically challenged in the notice of motion.* The Minister is not obliged to state the grounds on which the discretion has been exercised. It might well be that he is unable to decide whether Dr Dutt is or is not a workman under s 20(1). As stated by Suffian FCJ (as he then was) in *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v The industrial Court & Ors* [1970] 1 MLJ 78 at p 81; [1997] 3 CLJ 793:
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> > Before us the regularity of the Minister's act is not impugned and under s. 114 of the Evidence Ordinance this court may presume and does presume that the Minister's official act has been regularly performed. *When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so. The scheme of the Act read as a whole is that once a dispute of this nature has been referred by the Minister to the Industrial Court, the court is at once invested with jurisdiction and is obliged to decide one way or another ...*
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> Similarly, in the present case, Dr Dutt being dissatisfied with his dismissal, has made representation in writing under s 20(1) of the Act. Acting under s 20(3), the Minister has referred the representation to the Industrial Court for an award. What can the Industrial Court do other than entertain the representation and decide one way or another? The only difference between the *Sri Jaya* case and the present case is that the reference made by the Minister is not under the same section of the Act. The issue is the same, viz can the industrial Court refuse to make a decision once a representation is referred to it by the Minister? Again, in *Attorney-General, Malaysia v Chemical Workers' Union of Malaya & Anor* [1971] 1 MLJ 38 it was held by Abdul Aziz J that once a case is referred to it, the Industrial Court is seised with power to hear the dispute and make its award. I am, therefore, of the view that *whatever may be the rights of the parties, once the case is referred to the Industrial Court, it is fully endowed with jurisdiction.*
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> *Once endowed with jurisdiction, it is for the Industrial Court to decide, inter alia, whether Dr Dutt is a 'workman' within the meaning of s 20(1). If he is a workman, the Court must decide whether he has been dismissed without just cause or reason. If the court decides he has been dismissed without just cause or reason, the court will proceed to make an 'award',* which under s 2 is not confined merely to reinstatement but is wide enough to cover the power to make other orders in respect of the matter referred to if. (Emphasis added.)

[22] Having referred to the judgment of Mohamed Azmi J (as he then was) in *Assunta Hospital v Dr A Dutt* the Supreme Court in *Kathiravelu* had ruled that the threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference. The Supreme Court held:

> It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, eg, because the dispute is extraterritorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of prohibition against that court, in other words, the threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him.

[23] Apparently, the only position in law where the Industrial Court can refuse to act on the representation under s 20(3) of the IRA is when there is a clear violation of s 20(1A) of the IRA which prescribes the time limit for the filing of the representation with the Director General where in such circumstances, the Minister obviously had no power to confer threshold jurisdiction upon the Industrial Court. This is what the Federal Court had stated in the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238. In that case the Federal Court viewed as follows:

> *We cannot agree with the learned judge that it was for the Director-General to decide whether the claim was made within the time limit, and we think he went too far when he said that there was evidence for the Director-General to come to the conclusion that their claim was made within time.*
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> The determination of the issue whether the claim was made within the time limit involved mixed questions of law and fact for the Industrial Court, the fact being the ascertainment of the relevant conduct of the parties in pursuing their claim and the inferences proper to be drawn therefrom. Once that is ascertained, it is a question of law whether or not there was sufficient evidence that the claim was made in time. *On the facts, we are of the view that the claim was presented well outside the time limit and that being so, it was for the Industrial Court to say that it was wrongly conferred with jurisdiction. In the circumstances it is open to this court to interfere with the exercise of the Minister's discretion in referring the matter to the Industrial Court.*
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> *He had certainly exercised his discretion wrongly (see National Union of Hotel, Bar and Restaurant Workers v The Minister of Labour and Manpower* [1980] 1 MLJ 189). If an error of law by the Industrial Court can be seen as a misconception of its own jurisdiction and therefore an absence of jurisdiction, this court assumes a free-wheeling power to interfere by way of prohibition whenever it appears to it that some error of law going to its jurisdiction has been made by the Industrial Court. (Emphasis added.)

[24] Guided by the highest authority cited in the above, when there is no issue of the claim being made outside time-limit in the present matter, and where MACEE itself did not seek to quash the Minister's referral by way of a certiorari to the High Court, it is clear that there is no preliminary issue to be

determined by the Industrial Court ie whether it was competent to decide upon this matter which was referred to it by the Minister. In addition, and applying the ratio of the Supreme Court in *Kathiravelu*, it is therefore clear that the preliminary point raised by MACEE in the Industrial Court must be taken substantively as part of the entire hearing of the applicants' claims where MACEE bears the burden of proving the applicability of s 52(1) of the IRA.

[25] This court is further highlighted with the recent Court of Appeal's decision in the case of *Subramaniam a/l Letchimanan v The United States of America and another appeal* [2021] 5 MLJ 612. In that case, the third respondent who was working as a security guard at the United States Embassy in Kuala Lumpur was dismissed from his employment and on a complaint to the Minister, the matter was referred to the Industrial Court. The applicant filed judicial review application to quash the Minister's reference to prohibit the Industrial Court from adjudicating on the third respondent's representation and declare that the Industrial Court had no jurisdiction to make any determination on the third respondent's dismissal on the ground of sovereign immunity. The High Court agreed and quashed the Minister's decision. However, the Court of Appeal had overturned the High Court's decision and held that the Industrial Court has jurisdiction to hear the dispute. In the midst of writing this grounds of judgment, the Federal Court has affirmed the Court of Appeal's decision and had remitted the dismissal of the third respondent to the Industrial Court to be heard on its merit.

[26] Much as in the present case, in *Subramaniam a/l Letchimanan* the employer/respondent therein took the position that the United States of America's Embassy ('the USA') is not a legal entity. The relevant findings and rulings can be seen from the following excerpts of the Court of Appeal through the judgment of His Lordship Lee Swee Seng JCA as follows:

> [61] In the context of our fundamental liberties provisions in our Federal Constitution the matter assumes greater significance as the enshrined right to life in art 5 includes the right to livelihood, meaning to be engaged in lawful and gainful employment See *Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.
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> [146] This wider 'jurisdiction to decide whether there is jurisdiction' was explained in the leading case of *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1 at pp 10–11:
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> > When, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to their jurisdiction, the tribunal have to make up their minds whether they will act or not, and for that purpose to arrive at some decision on whether they have jurisdiction or not. *If their jurisdiction depends upon the existence of a state of facts, they must inform themselves about them, and if the facts are in dispute reach some conclusion on the merits of the dispute* ... I am unable to see

why the tribunal should, in making their preliminary inquiry, be restricted to any particular class of case, or how they can be restrained from investigating for their own purposes any point which they think it necessary to determine so that they can decide upon their course of action. (Emphasis added.)

[147] Once the narrow threshold initial jurisdiction of the Industrial Court is triggered by the Minister's Reference, the Industrial Court is then competent to inquire into whether it has the wider jurisdiction under the statute and the law based on a finding of the relevant facts and the law. Common issues would be whether the dismissed employee is a 'workman' within the meaning of the Act or as in this instance whether under international law state immunity can be raised as a valid defence to exclude jurisdiction of the Industrial Court.

...

[166] *The rationale expressed by the Supreme Court in Kathiravelu Ganesan as to why the Industrial Court 'must be permitted to decide the dispute to conclusion and in the process deal with the jurisdictional question' was that not to do so would obstruct the speedy disposal of a trade dispute and thereby defeat the spirit and intendment of the Act. That is understandable and a concern properly expressed especially in the light of s 30(3) of the IRA which provides as follows*:

> The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under sub-s 20(3).

[167] The two examples forefront in the mind of the Supreme Court were whether the particular claimant is or is not a workman and whether the matter involves the exercise of extra-territorial jurisdiction.

[168] *Nowhere was it stated that in a case where the preliminary issue raised like for example whether the work of the workman comes within the exemption of restrictive immunity in that it is within the sovereign immunity of the State and not that of a private commercial act, the parties cannot agree or that the Industrial Court cannot as a matter of prudence, decide that issue as a preliminary issue.*

[169] *The answer is clearly that the Industrial Court, as is the case with Employment Tribunals in other jurisdictions, has the duty to embark on a fact-finding to determine if the defence of State immunity applied to exclude the jurisdiction of the Court or Tribunal.*

[170] *Indeed as pointed out by the learned SFC, the respondent in their own O 53 statement acknowledged that the question of sovereign immunity involves factual issues, requiring among others an inquiry into the function of the workman's position in The USA embassy to determine whether the dismissal fell within the sphere of governmental or sovereign activity.*

[171] It would be premature and putting the cart before the horse for a party to seek an order to prohibit the Industrial Court from hearing the Reference before it makes a determination on the jurisdictional question. If a party is aggrieved, the proper recourse is to apply for judicial review against the Industrial Court after the Industrial Court has made a determination on that question.

> [172] *In this case, what the respondent The USA has invited the High Court to do is in effect to take over the function of a specialised statutory tribunal, and to determine the serious question of fact and law at first instance to the exclusion of the Industrial Court. Such an approach runs contrary to the scheme of the IRA and the basic principles of judicial review.*
>
> [173] At the Industrial Court its Chairman has the power under s 29(g) of the IRA to 'generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it' including deciding on a preliminary issue as to whether State immunity would apply based on the nature and duties of the claimant's employment as a security guard. (Emphasis added.)

[27] It could be gleaned from the judgment of the Court of Appeal in *Subramaniam a/l Letchimanan* that the dispute as to the dismissal of an employee must be adjudicated in full by the Industrial Court. The dispute can only be decided upon proper and complete consideration of both oral and documentary evidence by the Industrial Court. Relevant evidence can be appropriately given at the Industrial Court where the matter can be heard and parties may be examined on the true nature of both the applicants' employment as well as MACEE's formation ie whether it is a government entity, its functions and operations.

[28] It is important to note that the Industrial Court is a court of limited jurisdiction where it is to hear industrial dispute referred to it by the Minister under the IRA and the terms of reference itself determine the scope of its power and jurisdiction. The validity of the reference is for the High Court to determine and not the Industrial Court. This has been stated by the High Court of Rajasthan in the case of *State of Rajasthan and Ors v Harish Chandra Sharma and Ors* RLW 2006 (4) Raj 3028. The High Court in that case expressed the followings:

> The Supreme Court, in para 7 of the case of *Hochtief Gammon v Industrial Tribunal, Bhubaneshwar Orissa and Ors* held that Industrial Tribunal is a Tribunal of limited jurisdiction. Its jurisdiction is to try an industrial dispute referred to it for its adjudication by the appropriate Government by an order of reference passed under section 10. It is not open to the Tribunal to travel materially beyond the terms of reference, for it is well settled that the terms of reference determine the scope of its power and jurisdiction from case to case. The relevant portion of para 10 is as follows:
>
> *In dealing with this question, it is necessary to bear in mind one essential fact, and that is that the Industrial Tribunal is a Tribunal of limited jurisdiction. Its jurisdiction is to try an industrial dispute referred to it for its adjudication by the appropriate Government by an order of reference passed Under Section 10. It is not open to the Tribunal to travel materially beyond the terms of reference, for it is well settled that the terms of reference determine the scope of its power and jurisdiction from case to case.*

A The Supreme Court, in para 24 and 27 of case of N*ational Engineering Industries Ltd v State of Rajasthan and Ors* held that the Court competent to examine the validity of reference is the High Court and not the Industrial Tribunal. The relevant portion of Para Nos 24 and 27 is as follows:

> B It will be thus seen that the High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute and none apprehended which could be the subject-matter of reference for adjudication to the Industrial Tribunal under section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the Industrial Tribunal (sic dispute) which would clothe the appropriate Government with power to make the reference and the industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended the appropriate Government lacks power to make any reference.

D *The Industrial Tribunal is the creation of a statute and it gets jurisdiction on the basis of reference. It cannot go into the question on validity of reference.*

In view of the above, *it is well-settled position of law that once the reference is made to the Industrial Tribunal/Labour Court, then the court is bound to adjudicate the same. It is equally well-settled that the Labour.* (Emphasis added.)

E

[29] The Industrial Court must hear the entire dispute as referred to it by the Minister. This court agrees with the applicants' submission that the Industrial Court cannot abdicate its statutory duty to hear the entire reference on its merits, and in the course thereof make its findings on the entire dispute.

F

[30] It must be noted that s 52(1) of the IRA provides that the jurisdiction of the Industrial Court under Part VI (Representation of Dismissal) does not extend to employment by statutory authority or governmental employment. It must be taken as accepted and from the decided cases that the mere fact an G entity is established by the government, it does not automatically render a person a government servant.

[31] Bearing in mind that MACEE was established solely by virtue of the H binational agreement, that it is not a registered entity and neither was it incorporated under any statute, this court agrees with the applicants' submission that the mere fact that MACEE was established by the two governments, cannot render MACEE as a government entity. There are tests to be applied to determine whether an employee is a government servant and the I employer as a governmental body. As an example, the burden to prove that the employee's salary was funded solely from governmental sources rests on MACEE because the binational agreement clearly shows that MACEE is not funded solely by the two governments but in fact it receives funding, inter alia, from the private sources, as follows:

(a) article 1(3) — The Program shall be financed with funds made available to the Commission by or through the parties, and with funds of contributions received from other public and private sources, which support the purposes of this Agreement;

(b) article III (9) — Receive donations from public and private sources for projects and activities consonant with the purposes of this Commission; and

(c) article IX (2) — The parties shall, within the limits of their respective budgetary appropriations for this purpose and taking into account funds donated by other sources or income or income therefrom, make contributions to the Commission.

[32] Further, any employment in the public service is not governed by mere agreement between the employee servant and the governmental employers but also by statute or statutory or administrative rules made by the Government. In the present matter, it has not been shown under which statute or administrative rules the applicants were subject to in the course of their employment other than the employment of contract. In *Government of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222 Suffian FCJ (as he then was) stated as follows:

> I should add that the contract between a public servant such as the plaintiff and the government is of a very special kind, for as was stated by Ramaswami J at p 1894 when delivering the judgment of the Indian Supreme Court in *Roshan Lal Tandon v Union of India* 1967 AIR 1889:
>
> > *It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by Government … The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties.* (Emphasis added.)

[33] In *Roshan Lal Tandon v Union of India* 1967 AIR 1889, the court had stated:

> *But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties.* The duties of status are 'fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence *status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned.* (Emphasis added.)

[34] It must be added that whether MACEE is a statutory body under s 52

A does not arise. As stated earlier, MACEE is not a registered entity and neither was it incorporated under any statute. So, for the purpose of s 52 of the IRA, the questions would be whether an employee of MACEE can be considered workman employed by the Government or whether service with MACEE is considered as a form of Government Service?

B

[35] This court is of the considered view that the applicants were not government servant or under any of the government service in law. The employment of the applicants cannot be said to be a direct appointment by the Federal Government of Malaysia. No evidence is adduced to show the C proximity between the applicants and the Federal Government of Malaysia and the degree of control if any over the applicants by the Federal Government. The degree of control is a relevant factor to be taken into consideration. Reference was made by the applicants' learned counsel to the Petroleum Development D Act 1974 which this court is persuaded to be an appropriate analogy and guidance to the present matter. In that Act, s 3(1) provides the entire rights of the government of Malaysia to petroleum deposits which is vested in Petronas. By virtue of s 3(2) Petronas is subject to the 'control and direction' of the Prime Minister. Yet, at all material times the employees of Petronas have not been E regarded as being in government service or employees of a statutory body, as can be seen from the wealth of jurisprudence in the form of awards of the Industrial Court. Despite the extensive control that the Government has over the operations of Petronas, but yet, it has no control over the affairs of the employees and has no direct right to interfere in employment issues of F Petronas. This court agrees with the applicants' submission that this is precisely the same way that MACEE is run.

[36] This court further finds support from the binational agreement itself. Firstly, article V of the binational agreement provides for co-governance of G MACEE by five Malaysian members and five American members sitting on the Board. Article V(4) of the binational agreement states that the members are to be appointed by their respective governments. Article III(1)(b) of the binational agreement states that MACEE vide the Board shall appoint an executive director in order to exercise all powers necessary to achieve the H purposes set out in article II. Among others, the executive director shall in turn hire such other clerical and administrative staff as may be necessary. Therefore, the applicants in the instant matter have been appointed by the Commission vide the Board.

I **[37]** Section 2 of the IRA defines 'government' as 'the Federal Government or the Government of a State'. The Commission and the Board's constitution are binational in nature. They are not solely the province of a single state (Malaysia)/the government of Malaysia. As such, the applicants as the employee of MACEE cannot be gainsaid to be workman employed by the

Government of Malaysia as their service with MACEE is not a service under the Government of Malaysia. In addition, the appointment and dismissal of the applicants were done by the Commission of MACEE and not the Government of Malaysia. Nowhere in the binational agreement or evidence has been produced to state that the Government of Malaysia has the power to appoint or dismiss somebody in the applicants' positions. It is clear that the employment of the applicants by MACEE is inconsistent with the applicants being in government employment as envisaged by s 52(1) of the IRA 1967.

[38] It must be added that the fact that the members of MACEE Commission are appointed or removable by the government and that it can make rules and regulations relating to the duties and powers of employees cannot convert the applicants as government servants. In the case of *Maulana Abdul Shakur v Rikhab Chand and another* 1958 AIR 52, the Indian Supreme Court held:

> Merely because the Committee or the members of the Committee are removable by the Government of India or the Committee can make by-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the Committee into holders of office of profit under the Government of India.

[39] There is insufficient evidence or proof to show that the applicants come within the exception to the Industrial Court's jurisdiction under Part VI of the IRA which is a burden to be discharged by MACEE. The evidence led before the Industrial Court thus far has established that the applicants were never treated as government employees. The Industrial Court's jurisdiction over the representation cannot be barred under s 52(1) of the IRA. The present matter must be heard in full and where all evidence has been led by the parties. This court agrees with the submission on behalf of the applicants that representative of the Malaysian government must be called to determine MACEE's position particularly when COW-1 when cross-examined testified that he has no knowledge of matters such as the general orders that apply to the government employees. As such, a complete examination of all the evidence at the close of the trial is required before any determination can be made as to whether the applicants were government employees.

CONCLUSION

[40] Premise on the above, this court granted order in terms of the applicants' applications.

Order in terms of application granted.

Reported by Nabilah Syahida Abdullah Salleh